Supreme Court, U.S.
FILED
DEC 1 - 2008
OFFICE OF THE CLERK

No. 08-270

In The
Supreme Court of the United States

T H INVESTMENTS, INC.,

Petitioner,

vs.

KIRBY INLAND MARINE, L.P.,
AND PORT OF HOUSTON AUTHORITY
OF HARRIS COUNTY, TEXAS,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals for the Fourteenth District of Texas

KIRBY INLAND MARINE, L.P.'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J. STEPHEN BARRICK
HICKS THOMAS LLP
700 Louisiana Street,
Suite 2000
Houston, Texas 77002
(713) 547-9100

MURRY B. COHEN
Counsel of Record
AKIN GUMP STRAUSS
HAUER & FELD LLP
1111 Louisiana Street,
44th Floor
Houston, Texas 77002
(713) 220-5800

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
COUNTER-STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	5
I. THI Has No Property Interest in Submerged Tidelands	6
II. THI Has No Property Interest In Formerly Dry Land That Became Submerged Tidelands	8
III. THI's Argument Misconstrues *York*	9
IV. The Property No Longer Exists	11
CONCLUSION	12

TABLE OF AUTHORITIES

Page

CASES

Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) 5, 6

California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) 10

City of Corpus Christi v. Davis, 622 S.W.2d 640 (Tex. App. – Austin 1981, writ ref'd n.r.e.) 8

City of Port Isabel v. Missouri Pac. R.R. Co., 729 S.W.2d 939 (Tex. App. – Corpus Christi 1987, writ ref'd n.r.e.) 8

Coastal Indus. Water Auth. v. York, 532 S.W.2d 949 (Tex. 1976) 7, 9, 10

Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454 (1989) 5

Lakefront Trust, Inc. v. City of Port Arthur, 505 S.W.2d 606 (Tex. Civ. App. – Beaumont 1975, writ ref'd n.r.e.) 7

Lloyd A. Fry Roofing Co. v. Wood, 344 U.S. 157 (1952) 10

Lorino v. Crawford Packing Co., 175 S.W.2d 410 (Tex. 1943) 6, 7, 10

Matcha v. Mattox, 711 S.W.2d 95 (Tex. App. – Austin 1986, writ ref'd n.r.e.), *cert. denied*, 481 U.S. 1024 (1987) 8

Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988) 6, 7, 10

State v. Balli, 190 S.W.2d 71 (Tex. 1944) 7, 8

INTRODUCTION

T H Investments, Inc.'s ("THI") Petition should be denied because, even if this Court needed to address when a court may constitutionally declare that private ownership of property is lost without compensation, the facts of this case make it inappropriate for review.

This case involves submerged tidelands near the Texas Gulf Coast – land that is below the line of mean high tide, beneath navigable waters that are subject to the ebb and flow of the tide. Under longstanding common law principles that apply in most coastal states, including Texas – principles this Court has repeatedly recognized – the State owns all such tidelands. THI does not challenge this rule, and no authority has ever held it is unconstitutional.

Furthermore, the land at issue in this case became submerged long before THI acquired record title to it in 2002. It therefore belonged to the State of Texas before the seller conveyed it (by non-warranty deed) to THI, and THI never owned it in the first place. THI therefore has no constitutionally protected property interest and is not entitled to compensation under the Takings Clause or the Due Process Clause.

Finally, the manner in which the land in this case is described in the deed records makes it impossible to identify because the boundaries no longer exist. The boundary line of this property is the meander line of a river whose waters now cover it and have washed it to the point that it is indistinguishable

from the riverbed. Thus, even if it were theoretically possible for THI to have title to this submerged property, the boundary line is gone and THI has nothing for which it is entitled to compensation.

This case simply does not present any significant takings or due process issue for this Court to resolve. The Texas state courts applied longstanding common law principles, and THI never had a valid ownership interest in the property at issue. Therefore, the Petition should be denied.

COUNTER-STATEMENT OF THE CASE

THI's Statement of the Case is incomplete and misleading. Contrary to THI's statements, the Texas state courts did not "confiscate" or "extinguish" any property rights of THI. Rather, they held that THI could not prove its speculative claim of title to a parcel of submerged tidelands near the Texas Gulf Coast (the "Property") because title to that Property, under settled law, was held by the State of Texas.

THI's record title to the Property derives from a land patent from the Republic of Texas to Josiah T. Harrell in 1845, prior to Texas statehood. (Pet. App. 19, 53) The Property is a small tract of land along the southern boundary of the original Harrell patent that was once dry land, generally in the shape of a rabbit's head, abutting waters that flow directly into the Gulf of Mexico.

THI's petition describes the Property as consisting of 27 acres of dry land, but that is merely a historical approximation. (Pet. App. 2-3) The actual size and shape of the Property was subject to constant change because it was bounded by the "meanders of Old River." (Pet. App. 89)

When THI acquired record title to the Property in 2002, the Property was almost entirely submerged below the line of mean high tide, beneath navigable waters that are subject to the ebb and flow of the tide. (Pet. App. 91) It is now a featureless "flat" that is indistinguishable from the bed of Old River. (Pet. App. 92) To the extent that any part of the Property is not submerged at high tide, it is only because of the deposit of dredged spoil, sunken barges, and accretion caused by sunken barges and barge fleeting in the area. (Pet. App. 93)

Contrary to THI's contentions, Kirby Inland Marine, L.P. ("Kirby") did not use any portion of the Property for its business. Rather, the lower courts found, and THI does not dispute here, that Kirby only used an adjacent area, referred to as the "Big Empty," for its barge mooring and fleeting business. (Pet. App. 90) Although it is true that before THI acquired record title, Kirby and its predecessors leased the Property from the prior record owners (the "Carter Heirs"), Kirby only did so for a nominal amount to eliminate any doubt as to Kirby's right to use the adjacent waters, not because the Carter Heirs truly owned the Property and riparian rights associated with it. Indeed, when the Carter Heirs sold their

interest in the Property to THI in 2002, they refused to guarantee title, providing only a non-warranty deed. (Pet. App. 3) The Carter Heirs' spokesperson, Haliy Bryan Clements, testified that she thought the principals of THI must have "lost their minds" to pay good money for it. (6 RR 138-39)

THI never actually used the Property or had good reason to believe it had good title to the Property. Shortly after acquiring record title, THI demanded that Kirby increase its lease payments by 3,400 percent (from $1,000 to $35,000 per month), and threatened to evict Kirby. (Pet. 7; Pet. App. 5) That precipitated this lawsuit, which THI lost, so THI really used the Property only for this litigation. (*Id.*) Moreover, THI knew the dubious nature of its title because THI's agreement to acquire the Property from the Carter Heirs included a "Coastal Area Property" addendum that expressly warned THI that "[t]he real property described in and subject to this contract adjoins and shares a common boundary with the tidally influenced submerged lands of the state," and that THI "may gain or lose portions of the tract because of changes in the boundary." (Pet. App. 4)

The lower courts found this is precisely what happened, to the point that the entire tract consisted of "tidally influenced submerged lands of the state." The trial court specifically found that the Property is "submerged beneath the waters of Old River and the San Jacinto River" (Pet. App. 89); that it is "below the line of mean high tide" (Pet. App. 91); that its submergence "occurred gradually and imperceptibly and

caused the historic meander boundary of the [Property] to slowly contract and eventually to disappear" (*id.*); that the Property's boundary line "cannot now be identified or located" (Pet. App. 92); and that the water covering the Property is "navigable" and "subject to the ebb and flow of the tide." (Pet. App. 89-92) The court therefore applied the long-established public trust doctrine, recognized in Texas, and concluded that title to the property was in the State of Texas, not THI. (Pet. App. 94-96) And because the State of Texas had assigned its interest in submerged lands in the area to the predecessor of the Port of Houston Authority of Harris County, Texas (the "Port of Houston") by legislative act in 1927, the Property belonged to the Port of Houston, not to THI. (Pet. App. 97-99) The court of appeals upheld all of these findings, most of which THI did not challenge. (Pet. App. 9-16)

REASONS FOR DENYING THE WRIT

THI asks this Court to grant a writ of certiorari to decide whether the Texas state courts, by adjudicating that THI does not own the Property, effectively deprived THI of its property rights in violation of the Takings Clause and Due Process Clause of the U.S. Constitution. (Pet. 12-13) The threshold question in any such claim is whether the claimant has a constitutionally protected property interest. *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 460 (1989); *Board of Regents of State Colleges v. Roth*, 408 U.S.

564, 577 (1972). This requires THI to establish a legitimate claim of entitlement to the Property. *Id.* THI cannot make this showing.

I. THI Has No Property Interest in Submerged Tidelands.

The lower courts found, and it is undisputed, that the Property is submerged beneath navigable waters that are subject to the ebb and flow of the tide (referred to herein as "tidelands"). (Pet. App. 89-90) Under long-settled Texas law, and common law principles long recognized by this Court, the State owns all such tidelands. *See Lorino v. Crawford Packing Co.*, 175 S.W.2d 410, 413 (Tex. 1943) ("The soil covered by the bays, inlets, and arms of the Gulf of Mexico within tidewater limits belongs to the State"); *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 473-74 (1988) (recognizing "the settled rule of law in this court that absolute priority in, and dominion and sovereignty over, the soils under the tide waters . . . were reserved to the several States," including the original states and those, like Texas, that were admitted later). It has "been long established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit." *Phillips Petroleum*, 484 U.S. at 475.

The only part of the Property that is not submerged arose from submerged soil by the deposit of

dredged spoil and accretion caused by sunken barges, (Pet. App. 93), and Texas law holds that title remains with the State when it is raised through such "self-help." *See Coastal Indus. Water Auth. v. York*, 532 S.W.2d 949, 952 (Tex. 1976) (holding that one "may not acquire title to submerged land through self-help by filling and raising the land level"); *Lakefront Trust, Inc. v. City of Port Arthur*, 505 S.W.2d 606, 608 (Tex. Civ. App. – Beaumont 1975, writ ref'd n.r.e.) (holding that land that emerged through accretion belongs to the State).

THI does not claim, nor could it claim, the State ever intended to grant it or its predecessors title to any submerged tidelands. The original land patent from the Republic of Texas, dated March 18, 1845, evidences no intent to convey submerged lands, and even if it did, title was later granted to the State of Texas when it was admitted to the Union on December 29, 1845. *See Phillips Petroleum*, 484 U.S. at 477 (holding that "the States, upon entry into the Union, received ownership of all lands under waters subject to the ebb and flow of the tide," and affirming the lower court's holding that title to certain tidelands was in the State of Mississippi in spite of a prior Spanish land grant to a private owner). Moreover, under Texas law, title to submerged tidelands cannot be transferred into private ownership without an Act of the Legislature, and there was no such legislative act here. *State v. Balli*, 190 S.W.2d 71, 113-14 (Tex. 1944); *Lorino*, 175 S.W.2d at 414. Thus, THI's record title to the Property does not give it a legitimate

claim of entitlement to the Property because the land is submerged beneath waters subject to the ebb and flow of the tide.

II. THI Has No Property Interest In Formerly Dry Land That Became Submerged Tidelands.

Texas law is also well settled that coastal property boundaries automatically recede, with no right to compensation, when the water line encroaches. *See Balli*, 190 S.W.2d at 100 (holding that when the sea encroaches on an upland owner's property, ownership is lost with "no redress"); *City of Port Isabel v. Missouri Pac. R.R. Co.*, 729 S.W.2d 939, 942 (Tex. App. – Corpus Christi 1987, writ ref'd n.r.e.) (stating that "the location of the shoreline, wherever it may be at any given time, represents the boundary of a littoral owner's property."); *Matcha v. Mattox*, 711 S.W.2d 95, 99 (Tex. App. – Austin 1986, writ ref'd n.r.e.) (stating that the boundary line between private beachfront property and the state's submerged property line is the line of mean high tide, and it changes with the location of the water line), *cert. denied*, 481 U.S. 1024 (1987); *City of Corpus Christi v. Davis*, 622 S.W.2d 640, 643 (Tex. App. – Austin 1981, writ ref'd n.r.e.) (stating that the line of mean high tide is the boundary line, and if the sea encroaches, the upland owner loses his land and has "no redress"). Thus, THI's record title also does not give it a legitimate claim of entitlement to the Property merely because the land used to be above the line of mean high tide.

III. THI's Argument Misconstrues *York*.

THI's contention that it owns the Property, even though it is now submerged tidelands, is based on a misinterpretation of the Texas Supreme Court's decision in *Coastal Industrial Water Authority v. York*, which found that a Texas property owner retained title to property that became submerged due to subsidence. 532 S.W.2d at 954. THI makes much of the fact that the property involved in *York* is close in proximity to where the Property is located, but THI ignores the language in *York* explaining that its holding is limited to the peculiar facts developed in the record of that case. *See id.* at 951 & n.1.

The *York* opinion spends two paragraphs explaining that although the property at issue is located in the Houston Ship Channel, where one would expect the ebb and flow of the tide to wash it to the point where it was indistinct from the bed of the Ship Channel – in which case private "ownership would have been lost" – the testimony developed in that case was that the water did *not* fluctuate with the ebb and flow of the tide. *Id.* at 951-52 & n.1. Moreover, the parties in *York* assumed there had been no displacement of the submerged land in relation to the bed of the Ship Channel, and that there was no difficulty in identifying the boundaries of the tract. *Id.* at 952. Because of these peculiarities, the Texas Supreme Court emphasized that its opinion was "restricted to the issues presented by the peculiar facts of this record and the contentions of these parties." *Id.* at 951 n.1.

Unlike the evidence in *York*, the evidence here led the trial court to find that the Property is submerged beneath navigable waters that are subject to the ebb and flow of the tide (Pet. App. 89-90); that the Property became submerged gradually and imperceptibly over time due to a variety of natural and man-made forces, the effects of each of which cannot be separated (Pet. App. 91); that the Property's boundary line, described as the "meanders of Old River," can no longer be identified or located (Pet. App. 91-92); and that the Property is now a featureless "flat" that cannot be distinguished from the State's riverbed. (Pet. App. 92) These facts establish that the State owns the Property, not THI. *See Phillips Petroleum*, 484 U.S. at 474 n.3 (recognizing "many" state court decisions holding that "tidal flats" and "salt marshes" are state owned); *Lorino*, 175 S.W.2d at 413 (stating that the soil under tidewaters belongs to the State).

This Court generally accepts the factual findings of a state court absent "exceptional circumstances." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 111 (1980); *Lloyd A. Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952). No exceptional circumstances exist here to disregard the state court's factual findings, and based on those facts, the *York* opinion clearly does not provide THI a legitimate claim of entitlement to the submerged Property. Therefore, THI has no constitutionally protected property interest and no claim under the Takings Clause or the Due Process Clause.

IV. The Property No Longer Exists.

Finally, even if this Court were to conclude that THI had a constitutionally protected interest in the Property in spite of its gradual submergence under tidally influenced waters, the land described in the deed records no longer exists. The Property, which was first described in an 1896 deed, is situated along the southern boundary of the original Harrell patent, east of a north-south division line called the "Jones Hare line," bounded by the "meanders of Old River." (Pet. App. 89) At the time of trial, the "meanders of Old River" were no longer in existence, and could not be located, because the property was under water. (Pet. App. 91-92) Thus, the Property no longer exists and, for this independent reason, THI has no legitimate claim of entitlement.

CONCLUSION

THI has failed to show the Texas state court's judgment is worthy of review by this Court. The Petition should therefore be denied.

Respectfully submitted,

MURRY B. COHEN,
Counsel of Record
Texas Bar No. 04508500
AKIN GUMP STRAUSS
HAUER & FELD LLP
1111 Louisiana Street, 44th Floor
Houston, Texas 77002
(713) 220-5800
(713) 236-0822 (Fax)

J. STEPHEN BARRICK
Texas Bar No. 00796168
HICKS THOMAS LLP
700 Louisiana Street, Suite 2000
Houston, Texas 77002
(713) 547-9100
(713) 547-9150 (Fax)

Attorneys for Respondent
Kirby Inland Marine, L.P.